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ABSTRACT

Students do not leave their constitutional rights at the boundary of the school grounds. We would never send anyone to prison without a trial; to a lesser degree, expulsions and suspensions are in the same category. Your due process procedures should at least give a student (1) notice of the charges, (2) opportunity to be heard, and (3) opportunity to present witnesses. Private and parochial students are not guaranteed these rights. No matter how valid your procedure, you could still be in trouble if you violate a student's clearly established constitutional rights or if you act with malice. The more severe the penalty, the more elaborate your procedure should be. However, you are not required to set up a court-type hearing with cross-examination of witnesses by counsel. School officials generally have the right to inspect such school property as desks, lockers, rooms, and buses whenever they feel it necessary. However, generally a search warrant is necessary before a person or his premises may be searched. There is no rigid rule by which all conduct can be controlled, but if you are reasonable and evenhanded, you probably have no reason to fear taking whatever action you believe is in the best interest of the school.
(Author/JG)

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REMARKS BY

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"WILL YOUR DUE PROCESS PROCEDURES KEEP YOU OUT OF COURT"

(Clinic A-6)

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Contrary to public opinion the Supreme Court of the United States has not declared God is dead-nor has it even tried to do so. Neither has the Court ruled that board members and administrators cannot allow corporal punishment of students.

Your Due Process Procedures can never be guaranteed to keep you out of Court. However, they may very well reduce the number of suits filed and even vindicate you when you are compelled to appear in Court.

I suppose my opinions on this subject would fall in the minority category because I believe most Court decisions have been based on common sense and the laws and constitution. Until recent years most people seemed to take the view that board members, administrators and teachers were both "due process" and the "supreme law of the land" insofar as students were concerned. Therefore, it was a rude awakening when the "new breed" of lawyers commenced bringing court action relating to due process, equal protection and other rights.

My comments will be of a general nature rather than specific. Most of you are not lawyers, therefore the legal citations will be omitted but may be supplied later for those who care to stay after the clinic is concluded.

Equal Protection and Due Process are two separate and distinct rights. Everyone in the district could be given equal protection and at the same time denied due process. Due process can be divided into two parts-substance and procedure. We are focusing on procedure in this clinic. My remarks will apply primarily to due process relating to the rights of students. Mr. Stoops will cover the rest of the field.

Due Process Procedure applies to freedom of speech, right of assembly, violations of laws, rules and regulations and just about anything including policies of the school boards. Therefore, it is imperative that you arrange to follow an acceptable procedure regarding discipline, etc.

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Students do not leave their constitutional rights at the boundary of the school grounds. Most states have created a property right in the students by providing free and compulsary schools for the children in the state. Having created this right, which is not itself granted by the United States Constitution, the students then have the right to a constitutional due process hearing or procedure before the right may be taken from them.

The Fourteenth Amendment is the basis for decisions along this line of reason. School board members should be as interested in protecting the rights of students as well as the other areas of their responsibility. Therefore, a properly oriented board member should be able to serve as an impartial hearer or reviewer of facts surrounding suspension or expulsion of students.

We would never think of sending an accused person to prison without a trial. Expulsions and suspensions are in the same category-except to a lesser degree of severity-generally. If such expulsion or suspension were to come at a critical time and be of sufficient duration the resulting effect on the student could be serious and permanent.

Therefore, your procedures should give at least (1) notice of the charges (2) an opportunity to be heard and offer explanation, and (3) present witnesses on behalf of the student. Reasonable time should be allowed unless there are compelling reasons for an immediate suspension and in such event, notice and hearing should be granted as soon as the atmosphere permits.

Private and parochial students are not guaranteed these procedural rights.

Use common horse sense in making your procedure rules. Put yourself, if you can, back a few years and into the status of the student. Fair and impartial rules require you to do the right thing. If you keep these thoughts in mind you are more than apt to come up with a valid due process procedural rule. I suggest you pass it by the school attorney for his opinion.

No matter how valid your procedure may be you could still get into trouble and into Court-if you knew or should have known that your action violated a clearly established constitutional right of the student then you are in trouble and should not be on the board anyway. Likewise, if you act with malice or spite or in any bad faith manner you are subject to court action and possibly could be held liable for money damages. School board members hold only a qualified immunity in their positions. This immunity may be waived by the above type actions. None of you were drafted for your job and I am sure each of you want to do the very best possible performance of which you are capable.

Expulsions are of a more severe nature than suspensions. A ten day suspension, which seems to be the longest legal suspension possible, is more severe than a two day suspension. The more severe the penalty the more elaborate your procedure should be. For instance if you are acting upon hearsay evidence you should likely never summarily suspend a student. On the other hand if the principal or a teacher observes the act of misconduct on the part of the student, the notice and hearing could be held immediately and on the spot. If the student admits the violation, and knew or should have known, the conduct could result in suspension, then there is no need for an extended hearing. Even then a written report should be made for the record and the student or parents.

When the violation and the penalty are more severe then your procedure and hearing should be more sophisticated. At this time you are not required to set up an adversary court type hearing in which cross examination by counsel is required. If you keep a verbatim record you will likely have to furnish the student a copy. Therefore, I suggest a tape recording be made and the proceedings reduced to writing in summarized form only. Reasonable time for one set of allegations may be different from another.

The use of corporal punishment should be preceded by a hearing and inflicted in the presence of a second school official. It should be a last line remedy after other means have failed to correct the situation. Again, such punishment must be used in a common sense manner.

I want to emphasize that students, administrators and board members do not need to be adversaries. They are one team all headed for the same goal-education for all of the students and a wise use of the taxpayers money. We have a tendency to over react to most changes. Our goal here is to better acquaint you with the manner in which you handle the problems in your schools. It is my opinion that things are already getting better. We are having fewer suits in our district than we were a few years ago. Hopefully, all of us will be able to say the same thing when we meet next year.

There is no set rigid rule by which all conduct can be controlled. Each case must be judged on the circumstances surrounding it.

When speech or conduct disrupts others and the educational process it is actionable. When it affects only those involved and is no threat to the orderly conduct of school, nor infringes on the rights of others, it is not usually actionable.

If the action you take is reasonable and is even handed you probably have no reason to fear taking whatever action you believe is in the best interest of the school. This is so even if it turns out you were wrong in the final analysis.

We have come a long way since Brown v. Board of Education (1954) and I feel the light at the end of the turmoil is visible. There has been, and continues to be, a minimal supervision of the schools by the federal courts. However, the Courts are probably as interested in getting out of the school business as the schools are in getting them out. Fair and adequate due process procedures are one of the most effective means of achieving the desired results.

I will touch briefly on search and seizures which you might reasonably be expected to encounter. The Fourth Amendment as applied to schools and students is rather difficult to define. The Courts are not unanimous in the interpretation of the Fourth Amendment.

Some conclusions can be fairly reached when you read cases from various jurisdictions. First, desks, lockers, rooms, and school buses are generally the property of the schools and are under their control and supervision. It is a fairly safe statement to say school officials have the right to inspect these places whenever they feel it is necessary. Certainly if there is valid reason to believe contraband or prohibited items are concealed in such premises the right to search exists.

Generally speaking a search warrant is to be issued, upon probable cause, before a person or his premises may be searched.

However, if the party consents to a search he waives the protection of the Fourth Amendment. This is usually accomplished by asking the person to allow the search. Many cases have held the school principal may consent to the search of school lockers even over the objecting student. The Fourth Amendment protects people not places. Dormitory rooms, purses, pockets and automobiles do not fit into the category of places which may be searched without permission or warrant.

If the illegal object is in plain view of the officer or school official it may be seized. This generally applies to automobiles as well as other places. Certainly if the object is on the person or in the hands and is visible it too may be seized.

The stop and frisk rule may be applied in cases where there are reasonable grounds to suspect mass disruptions of school activities or gang fights. In other words, a school official may properly respond to an emergency situation when there is reason to believe harm may be eminent to students or faculty or that mass disruption may occur. A bomb threat would likely justify a complete search of all school property.

Another situation could justify a search of persons without a warrant. If the item is about to be removed from the jurisdiction of the school such search would in all probability be proper.

An example would be if a watch or billfold were taken while the students were in P.E., while the students were still in the gym, it would be appropriate to have them empty their pockets or purses to look for the item. Discretion would seem to require each student to be searched out of the presence of the others. Drugs are items which would disappear without on the spot searches.

Leave off campus searches to the police.

Hopefully we have been of some assistance to you in handling future problems in your schools.

JOHN I. PURTLE